89- 1423

No. _____

In The

Supreme Court of the United States

October Term, 1989

ROBERT COOK,

Petitioner,

vs.

UNITED STATES OF AMERICA,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE TENTH CIRCUIT COURT OF APPEALS

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QUESTION PRESENTED FOR REVIEW

Whether a "bare bones" affidavit can support a search where probable cause is not demonstrated, and no objective showing of "good faith" was made by the prosecution pursuant to *United States v. Leon*, 468 U.S. 897, 104 S.Ct. 3405, 82 L.Ed.2d 677 (1984), even to the extent of disclosing the actual existence of a claimed "confidential informant" upon whose supposed statements the warrant was issued?

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OPINIONS BELOW

The legality of this search was first before the Tenth Circuit upon interlocutory appeal, after the District Court Judge held the search unlawful, finding the absence of probable cause and "good faith". The Tenth Circuit reversed in *United States v. Cook*, 854 F.2d 371 (10th Cir. 1988). Certiorari to this Court was denied. *Cook v. United States*, ___ U.S. ___, 109 S.Ct. 788, 102 L.Ed.2d 779 (1989). Upon remand, judgment of conviction was entered, affirmed by the Tenth Circuit by its Opinion of December 11, 1989. Both opinions appear in the Appendix. The Petition for Rehearing upon second appeal was denied on

February 2, 1990; a copy of the denial of that Petition for Rehearing appears in the Appendix.

GROUNDS ON WHICH THE JURISDICTION OF THIS COURT IS INVOKED

28 U.S.C. § 1254: CERTIORARI JURISDICTION.

CONSTITUTIONAL PROVISIONS AND STATUTES

United States Constitution Amendment IV:

> "The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no
>
> Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized."

STATEMENT OF THE CASE

Petitioner Robert Cook was charged with violating 21 U.S.C. § 841(a)(1), based on cocaine seized from his apartment during a "no-knock" search. State police officers conducted the search, under a warrant issued by a novice state judge, upon the "bare-bones" affidavit of a fourteen-year veteran of the police force. *Contrast United States v. Leon*, 468 U.S. 897, 104 S.Ct. 3405, 82 L.Ed.2d 677 (1984). The affidavit did not establish probable cause, simply stating the suspicions of an off-duty police officer, and

the supposed statements of a claimed "confidential informant", concerning conduct by Cook uncorroborated by investigation, and lacking in detail.

The District Court wasted no time in suppressing the fruits of the search, holding that the affidavit did not come close to establishing probable cause. The court also held, after evidentiary hearing, that the prosecution had failed to carry its burden of proof under *Leon* to demonstrate that the officers executing the warrant acted in "good faith". The affidavit and testimony at the hearing appear in the Appendix.

The Tenth Circuit reversed in *United States v. Cook*, 854 F.2d 371 (10th Cir. 1988). Although in that opinion, the Court acknowledged that the evidence introduced at the suppression hearing was "anemic at best", and the sufficiency of the affidavit was debatable, suppression was reversed regardless based on a *de novo* finding that the officers acted in "good faith". A pretrial Petition for Writ of Certiorari to this Honorable Court was denied; upon remand, conviction resulted, a conviction upheld by the Tenth Circuit.

This case is once again before this Court, but in a different posture: conviction has in fact taken place, a final judgment of conviction. At stake here, however, is much more than one prisoner's ten-year sentence, one decade of incarceration. What is really at risk in this case is the Fourth Amendment itself, and the parameters of the "good faith exception" created in *Leon*.

Can the Constitution possibly be satisfied by a "bare-bones" which fails to establish probable cause, upheld

despite the absence of evidence supporting objective reasonableness, since the Fourth Amendment specifically requires that "*no* warrants shall issue, but upon probable cause?" This case reveals the extent to which the "good faith" exception can be improperly applied, to completely eliminate the Fourth Amendment, especially in the absence of disclosure of even the existence of the "confidential informant", whose unsubstantiated statements gave rise to the search. The circumstances of this case, and its impact within the Tenth Circuit, warrant grant of certiorari to set aside the novel and cavalier attitude of the Tenth Circuit towards the Fourth Amendment as revealed in this case.

ARGUMENT

A RESIDENTIAL SEARCH BASED ONLY UPON A WARRANT ISSUED ON THE ALLEGED STATEMENTS ATTRIBUTED TO AN UNDISCLOSED "CONFIDENTIAL INFORMANT" DOES NOT SATISFY THE FOURTH AMENDMENT, AND CANNOT JUSTIFY APPLICATION OF THE "GOOD FAITH EXCEPTION" CREATED BY *UNITED STATES V. LEON*

The Fourth Amendment to the United States Constitution provides as follows:

> The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and *no Warrants shall issue, but upon probable cause,* supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized. (Emphasis supplied).

In this case, the Tenth Circuit has upheld a search based on an affidavit which clearly did not establish probable cause, making its own finding of "good faith", without factual basis, and contrary to the trial court's factual determination. The affidavit in this case is precisely of the "bare-bones" genre decried in *Leon*. Moreover, the affidavit was fatally defective under *Illinois v. Gates*, 462 U.S. 213, 106 S.Ct. 2317, 76 L.Ed.2d 527 (1983), and was issued under circumstances which were suggestive that no confidential informant ever existed, let alone that reliable information attributed to the informant had been provided to the police.

Here, probable cause was found by the District Court to be absent, that the affidavit did not warrant the police in conducting a full-scale search of a citizen's residence. The search was upon warrant issued based on the unsubstantiated claims of an unidentified "confidential informant." In order to pass constitutional muster, however, a "substantial basis" must be shown for crediting such hearsay information in affidavits for search warrants. *Illinois v. Gates, supra; Jones v. United States*, 362 U.S. 257, 80 S.Ct. 725, 4 L.Ed.2d 697 (1960).

Prior to *Gates*, the seminal decisions governing affidavit sufficiency were *Spinelli v. United States*, 393 U.S. 410, 89 S.Ct. 584, 21 L.Ed.2d 637 (1969), and *Aguilar v. Texas*, 378 U.S. 108, 84 S.Ct. 1509, 4 L.Ed.2d 723 (1964). These two cases gave rise to the "two-prong" test, abandoned in *Illinois v. Gates, supra*, where, a "totality of circumstances" analysis was adopted.

To be legally sufficient, therefore, an affidavit for search warrant must demonstrate "a fair probability that

contraband or evidence of a crime will be found at a particular place." *Illinois v. Gates, supra.* Although the *Aguilar-Spinelli* analysis is no longer strictly applied, nevertheless it is still the law that the veracity and reliability of confidential informants "are all highly relevant." *Illinois v. Gates, supra.*

The affidavit in this case did not even begin to provide a "substantial basis" for probable cause. The "confidential informant" in this case was "not even alleged to be reliable." *See Maddox v. State,* 133 Ga. App. 709, 213 S.E.2d 1 (1975). Here, unlike *Gates,* there was no significant corroboration. Indeed, the circumstances under which the warrant was issued, and the absence of detailed facts, corroborated or otherwise, raise considerable doubt that the confidential informant even existed.

Corroborating facts to elevate hearsay into probable cause "must be sufficient to raise the reliability to constitutional standards," *United States v. Evans,* 481 F.2d 990 (9th Cir. 1973), and such corroboration must do more than confirm minor details of the tip such as confirming the identity of the owner of certain premises or their appearance. *United States v. Menser,* 360 F.2d 199 (2d Cir. 1966). Corroboration of "major portions" of a tip are necessary to satisfy the "substantial basis" test, corroboration in such detail as to satisfy the likelihood that the confidential informant "knows whereof he speaks." *See Illinois v. Gates, supra; Draper v. United States,* 358 U.S. 307, 79 S.Ct. 329, 3 L.Ed.2d 327 (1959).

Here, there was no corroboration of "major portions" of the unnamed "confidential informant's" tip: on the contrary, only the fact of residence, already known to the

police, was "corroborated." The affidavit was clearly defective under *Gates*.

The Court of Appeals disregarded the insufficiency of the affidavit, however, based on its own unique *de novo* review finding of "good faith". No matter how phrased, what the Tenth Circuit really did was rewrite the Constitution. As put into practice by the Tenth Circuit in this case, "the protections of the Fourth Amendment would evaporate, and the people would be 'secure in their persons, houses, papers, and effects,' only in the discretion of the police." *United States v. Leon, supra* n. 13. If the approach taken by the Tenth Circuit is permitted to stand, the Fourth Amendment would be eviscerated in Colorado and other states within that Circuit.

The "good faith exception" created in *Leon* is not one of subjective good faith, but rather, is an objective "standard of reasonableness." *United States v. Leon, supra* n. 20. Here, the Government put on no evidence at all concerning the objective reasonableness of the affiant's reliance: there was no evidence introduced that the affiant reasonably relied on this recently-appointed judge's determination of probable cause, nor that he would have been objectively reasonable in doing so. What the police officer said was only that he went to the judge for a search warrant because he "believed at the time that there were drugs present in the apartment mentioned." This testimony manifestly could not support a finding of "good faith" under *Leon*.

The affidavit in this case is precisely the "bare-bones" affidavit found objectionable in *Gates*. Unlike the detailed

information provided by the informant in *Gates*, the affidavit in this case only alleged that a first-time confidential informant, of no known reliability, and about whom no other information was provided, told the affiant that Cook lived in the apartment, and claimed that the "informant" had allegedly observed Cook in possession of cocaine and money.

No detailed description was given of the conduct allegedly engaged in by Cook, his habits, the interior of the apartment, nor any other aspect of the informant's claimed observations, so as to corroborate the reliability of the informant and the claimed observations. For that matter, no facts corroborated the existence of the informant in the first place.

Police investigation only corroborated that Petitioner lived in the apartment, which was already known to members of the department, who had pre-existing suspicions about Cook. Indeed, approximately a month before the affidavit, an off-duty police officer circulated within the Denver Police Department a memorandum which voiced the officer's suspicions that Cook might be trafficking in narcotics because of what the officer perceived to be increased "traffic" around the apartment complex. These pre-existing suspicions in fact resulted in the stopping and questioning of numerous people, who the officer believed might have been visitors to the petitioner's residence.

Approximately a month later, the existence of an unnamed "confidential informant" was coincidentally revealed for the first time, through the affidavit. It appears

all too coincidental that the full scale search of petitioner's apartment only came about based on the uncorroborated claims of the "hauntingly familiar" confidential informant, whose claimed observations corroborated preexisting suspicions by the police. *See United States ex rel. Metze v. State*, 303 F. Supp. 1359 (D.N.Y. 1969).

What compounds the constitutional deprivation in this case was the denial of disclosure of the confidential informant, even to the extent of an *in camera* disclosure to the Court. *See State v. Brunes*, 373 N.W.2d 381 (Minn. App. 1985). Without question, the actual existence of the informant was unquestionably "relevant and helpful to the defense", *see Rovario v. United States*, 353 U.S. 53, 77 S.Ct. 623, 1 L.Ed.2d 639 (1957). In this particular case, since there was no reason to believe that the "confidential informant" even existed, as the information claimed to have been provided was not so particularized as to preclude the conclusion that the informant was not fabricated "out of whole cloth". *See Spinelli v. United States, supra*. Thus, the denial of disclosure, coupled with the "bare-bones" affidavit, resulted in a conviction tainted by a blatant violation of the Fourth Amendment.

In this case, the existence or non-existence of the confidential informant, and disclosure of the identity and the information supposedly provided to the affiant, would have been dispositive of both probable cause and "good faith". The nonexistence of the confidential informant would have unquestionably demonstrated the absence of probable cause, and negated any possible argument that the search was conducted in "good faith" merely because it took place pursuant to a warrant signed by a newly-appointed state court judge.

It is never possible for an accused person to prove the *non*-existence of a confidential informant. Established case law limiting disclosure for suppression hearing purposes, when taken together with the "good faith" exception as applied by the Tenth Circuit, paved the way here for the total evaporation of the protections of the Fourth Amendment. The two *Cook* decisions at issue here thus make the mere issuance of a search warrant by a state court judge, whatever his or her qualifications or knowledge of the law, dispositive of challenges to searches under the Fourth Amendment. The need for grant of certiorari in this case is substantial.

The affidavit provided no basis for the Tenth Circuit's appellate finding of "good faith"; manifestly the evidence adduced by the Government failed to carry the burden of proof that the "good faith" exception saved the search. The search warrant in this case was issued on the basis of an affidavit which did not provide probable cause, resulting in an unconstitutional search, and an unconstitutionally-obtained conviction. To deny suppression of the evidence from this search, as did the Tenth Circuit, based on its insupportable *ad hoc* finding of "good faith", brings to life precisely the concerns which motivated this Court to require objective reasonableness in the first place.

Here, since the affidavit itself was devoid of factual support for probable cause, and the government introduced no evidence of objective reasonableness, the trial court's findings should have been affirmed. Any other result would permit the police, and not the judiciary, to determine dispositively the legality of searches through later testimony about their noble intentions, subjective

perceptions, and their "reliance" on the probable cause "review" made by any state court judge. The "exception" subsumed the "rule". The Fourth Amendment guarantees that search warrants issue only *upon probable cause*, not that "good faith" can be rewritten into the Constitution in the manner writ by the Tenth Circuit here.

Upholding the search in this case would have the effect of eliminating judicial review of probable cause in the Tenth Circuit, as a practical matter, whenever a search warrant was involved. Probable cause has thus become expendable in the Tenth Circuit, so long as the officers seeking the warrant managed to persuade a state judicial officer to sign the warrant initially. This is not consistent with the Fourth Amendment, and represents a gross distortion of this Court's decision in *United States v. Gates, supra.*

CONCLUSION

The petitioner therefore prays that this Honorable Court will issue its writ of certiorari to review those two decisions of the Tenth Circuit, and reverse.

Respectfully submitted,

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APPENDIX A

PUBLISH

UNITED STATES COURT OF APPEALS

TENTH CIRCUIT

UNITED STATES OF AMERICA, Plaintiff-Appellant,	)	No. 88-1124
v.	)	(Filed Aug. 16, 1988)
ROBERT DOUGLAS COOK, Defendant-Appellee.	)	

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF COLORADO (D.C. No. 87-CR-372)

Kathryn Meyer, Assistant United States Attorney (and Michael J. Norton, United States Attorney, with her on the brief), Denver, Colorado, for Plaintiff-Appellant.

Scott H. Robinson, of GERASH, ROBINSON & MIRANDA, P.C., Denver, Colorado for Defendant-Appellee.

Before MCKAY and BRORBY, Circuit Judges, and PARKER,* District Judge.

BRORBY, Circuit Judge.

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* The Honorable James A. Parker, United States District Judge for the District of New Mexico, sitting by designation.

This case comes before the court on an interlocutory appeal pursuant to 18 U.S.C. § 3731 and Fed. R. App. P. 4(b). The United States District Court for the District of Colorado suppressed a quantity of cocaine, physical evidence of a violation of 21 U.S.C. § 841(a)(1). The Government appeals.

The Government presents two issues: (1) did the district court err in finding that the affidavit in support of the search warrant failed to establish probable cause; and (2) did the district court err in refusing to apply the "good faith exception" to the exclusionary rule as set forth in *United States v. Leon*, 468 U.S. 897, *reh. denied* 468 U.S. 1250 (1984). Assuming but not holding that the affidavit fails to establish probable cause, we believe the district court erred in refusing to apply the good faith exception to the exclusionary rule as set forth in *Leon*.

The facts of the case are undisputed. On November 27, 1987, a detective with the Denver Police Department applied for and obtained a search warrant to search the defendant's apartment. At the time of the application, he had been a law enforcement officer for fourteen years and had served at least eleven of those years in the Narcotics Bureau of the Denver Police Department. He personally prepared the affidavit in support of the warrant, and delivered it to a deputy district attorney in Denver, who read and approved the documents. The detective then presented the affidavit to a state court judge who issued the warrant commanding the named detective or any other officer authorized to search for and seize evidence as detailed in the warrant. The execution thereof netted bulk cocaine, sealed packaged cocaine, bulk marijuana,

narcotic paraphernalia and packaging equipment, a police scanner, and other items. Subsequently the defendant was indicted by a federal grand jury for possession with the intent to distribute in excess of 500 grams of cocaine in violation of 21 U.S.C. § 841(a)(1). The defendant filed a Motion to Suppress, the district court granted the motion, and the Government now appeals.

GOOD FAITH EXCEPTION

In *Leon*, the Supreme Court modified the Fourth Amendment exclusionary rule to provide that evidence seized under a warrant later found to be invalid may be admissible if the executing officers acted in good faith and in reasonable reliance on the warrant. *United States v. Leary*, 846 F.2d 592, 607 (10th Cir. 1988); *United States v. Medlin*, 798 F.2d 407, 409 (10th Cir. 1986). The *Leon* Court applied the "good faith" exception to admit the evidence from a search warrant subsequently invalidated by a lack of probable cause.

In determining whether we should apply the exception, the "good-faith inquiry is confined to the objectively ascertainable question whether a reasonably well trained officer would have known that the search was illegal despite the magistrate's authorization." *Leon*, 468 U.S. at 922, n.23. To answer this "objectively ascertainable question," we are to consider "all of the circumstances," *id.*, and assume that the executing "officers . . . have a reasonable knowledge of what the law prohibits." *Id.* at 919-20, n.20; *Leary*, 846 F.2d at 607. Furthermore, "[t]he government, not the defendant, bears the burden of proving that

its agents' reliance upon the warrant was objectively reasonable." *United States v. Michaelian*, 803 F.2d 1042, 1048 (9th Cir. 1986); *Leary*, 846 F.2d at 607, n.26.

The record in this case reveals that at the suppression hearing the Government introduced into evidence the affidavit, search warrant, and return and inventory. At that hearing the detective who drafted and swore to the contents of the affidavit testified: (1) he was a police officer for the City and County of Denver, had been a police officer for approximately fourteen and one-half years, and had been assigned to his current work in the narcotics bureau for approximately eleven and one-half to twelve years; (2) he prepared the affidavit; (3) he took the affidavit to a deputy district attorney in Denver who read and approved it; (4) he then took the documents to a county court judge, who asked him no questions and issued the search warrant; (5) he had never met the judge before and had no idea how long he had been a judge; (6) the detective had prepared at least thirty or forty affidavits for search warrants previously, although the record fails to indicate how many of those affidavits were refused, approved or later upheld by reviewing courts.

The Government's elicitation of facts at the suppression hearing was anemic at best. Even so, combined with the facts stated in the affidavit, we believe that the record demonstrates that a reasonably well-trained law enforcement officer would not have known that the search was illegal [assuming it was] despite the magistrate's authorization, as contemplated in *Leon*, 468 U.S. 897. The detective's reliance on the legality of the warrant was objectively reasonable.

In reaching our conclusion, we first note that the affidavit is not devoid of facts. *See United States v. Cardall*, 773 F.2d 1128, 1133 (10th Cir. 1985); *Medlin*, 798 F.2d at 409. The sources of facts in the affidavit include a first-time confidential informant (C.I.), two detectives, a police officer, and Denver Police Department records. According to the affidavit, within twenty-four hours of drafting the affidavit the C.I. told the affiant that within the last three days he was at 9888 E. Vassar Drive, Building J, Apartment No. 208 in the City and County of Denver, he observed a male person known to him as "R. C. Cook" in the possession of several "paper decks" of cocaine and large sums of United States currency. The C.I. told the affiant that he had seen cocaine in Cook's possession at that location on several other occasions, and that Cook told the C.I. he was selling the cocaine. The C.I. also stated to the affiant that he was familiar with the appearance and packaging of cocaine because he had purchased and used cocaine in the past.

The affidavit also indicated that the day before the affiant applied for the warrant, a named police officer, who had been working at the apartment complex, observed a lot of foot traffic in and around Building J, Apartment No. 208. The affiant recites in the affidavit his training and experience (as testified to at the suppression hearing), and states that the described activity is consistent with drug trafficking. On investigation, he learned that a party known as Robert Douglas Cook occupied the apartment. Denver Police Department records revealed that Cook was on probation currently for possession of a controlled substance. The affiant possessed a copy of the

judgment of conviction revealing Cook's six year probation. The officer described the address, location, and identifying characteristics of the building where Cook lived.

The second named detective furnished the affiant with the facts that on the date of application for the warrant the buildings were as the above-named officer described and Cook was still listed next to Apartment No. 208 on the inside of building J. Affiant then recites that a records check of Robert D. Cook revealed that he had been arrested in Denver on at least two occasions for illegal possession of a controlled substance, including arrest in possession of cocaine and a .22 caliber handgun in 1985 and another arrest in 1985 in possession of 26.5 grams of cocaine and a .22 caliber handgun.

Although there is a continuing debate about the sufficiency of the affidavit to establish probable cause, we do not believe that the affidavit is so lacking in facts that a reasonably well trained officer would have known that the search was illegal despite the judicial authorization. *Leon*, 468 U.S. at 922, n.23. *Leary*, 846 F.2d at 607. The officer sought review and approval of the affidavit by a prosecutor before seeking and receiving issuance of the warrant by a judge. The issuing judge found that the facts established probable cause to issue the search warrant. The record reveals that in suppressing the evidence, the reviewing judge viewed the affidavit deficient for the reasons that the affidavit: contained no definition of a "deck" of cocaine; failed to describe a recognizable quantity of cocaine; failed to establish the reliability of the confidential informant; failed to demonstrate corroboration of the information from the confidential informant;

and contraindicated suspicion by stating the suspect was on probation for a drug offense. Even with time to reflect, judges now cannot agree on the sufficiency of the affidavit to establish probable cause. As in *Medlin*, "[i]n such a case the good faith principles established in *Leon* . . . come into play directly." *Id.*, 789 F.2d at 409.

We hold under *Leon*, that the detective's reliance on the judge's probable cause determination and on the technical sufficiency of the warrant was objectively reasonable. The Court stated in *Leon*, 468 U.S. at 926:

> [The] application for a warrant clearly was supported by much more than a "bare bones" affidavit. The affidavit related the results of an extensive investigation and, as the opinions of the divided panel of the Court of Appeals make clear, provided evidence sufficient to create disagreement among thoughtful and competent judges as to the existence of probable cause. Under these circumstances, the officers' reliance on the magistrate's determination of probable cause was objectively reasonable.

Our conclusion herein follows the rationale of *Leon*.

We also believe the application of the extreme sanction of exclusion is inappropriate in this case. As the Court made clear in *Leon*, the exclusionary rule is designed to deter police misconduct rather than to punish the errors of judges and magistrates. *Leon*, 468 U.S. at 916. As the Court stated:

> In the ordinary case, an officer cannot be expected to question the magistrate's probable cause determination. . . . "[O]nce the warrant issues, there is literally nothing more the policeman can do in seeking to comply with the

> law." . . . Penalizing the officer for the magistrate's error, rather than his own, cannot logically contribute to the deterrence of Fourth Amendment violations. *Id.*, 468 U.S. at 921.

The record establishes that the detective's reliance on the judge's determination of probable cause was objectively reasonable. We REVERSE.

APPENDIX B

UNITED STATES COURT OF APPEALS

TENTH CIRCUIT

UNITED STATES OF AMERICA, Plaintiff-Appellee,	)	No. 88-2930
v.	)	(D.C. No. 87-CR-372)
ROBERT DOUGLAS COOK, Defendant-Appellant.	)	(District of Colorado)

ORDER AND JUDGMENT*

(Filed Dec 11, 1989)

Before HOLLOWAY, Chief Judge, GARTH** and McKAY, Circuit Judges.

Defendant was convicted by a jury of possession with intent to distribute in excess of five hundred (500) grams of cocaine, in violation of 21 U.S.C. § 841a(1). Defendant raises three issues on appeal:

I. The search warrant with which the cocaine was seized from defendant's apartment

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* This order and judgment has no precedential value and shall not be cited, or used by any court within the Tenth Circuit, except for purposes of establishing the doctrines of the law of the case, res judicata, or collateral estoppel. 10th Cir. R. 36.3.

** Honorable Leonard I. Garth, United States Circuit Judge for the Third Circuit, sitting by designation.

was invalid, therefore the evidence should not have been admitted at trial because it was the product of an illegal search.

II. Defendant argues that his statements made in custodial arrest during the search should have been suppressed and not introduced at trial.

III. The trial court erred in denying defendant's motion to require the disclosure of the confidential informant whose statements were made a part of the search warrant.

I.

Originally the trial court suppressed the evidence obtained on the ground that the search warrant was deficient. On interlocutory appeal this court reversed, holding that the search warrant affidavit was sufficient to satisfy the good faith exception to the exclusionary rules. *United States v. Cook*, 854 F.2d 371 (10th Cir. 1988). Despite defendant's urgings, we decline to reconsider matters determined in that prior interlocutory appeal. In his briefs, defendant does not offer any additional evidence presented at trial relating to the sufficiency of the search warrant which was not considered by the prior panel of this court. We therefore reject defendant's claim that the cocaine was improperly admitted at trial.

II.

We reject defendant's argument that his arrest made during the search was without probable cause. All that is required is that at the moment of arrest the officers have

knowledge of reasonably trustworthy facts and circumstances sufficient to warrant a prudent person in the belief that the arrestee has committed or was committing an offense. *Beck v. Ohio*, 379 U.S. 89, 91 (1964).

In addition to the information contained in the search warrant, the arresting officer, upon entry into the apartment, observed a cocaine grinder lid containing a white powdery residue. The officer testified that in his experience as a narcotics investigator he had seen such grinders on numerous occasions and that their use in every circumstances had been associated with refining controlled substances. Transcript, October 31, 1988, at 11-28. Although the white powdery substance on the grinder lid was not field-tested, the testimony about the grinder, together with other information about probable drug dealing by the defendant in his apartment, are more than sufficient to support his arrest. The defendant was adequately warned of his rights. It follows that his custodial statements made after adequate warnings were properly admitted at trial.

III.

The defendant attempts to fashion an argument raising doubt as to the very existence of the confidential informant whose statements to the procuring officer were included as a part of the support for the search warrant in this case. It is clear that something more than mere speculation is required in order to mandate the disclosure of confidential informants to accused persons. *McCray v. Illinois*, 386 U.S. 300, 304-05 (1967). Other than argument, nothing has been presented either here or below which

puts in question the officer's credibility in reciting the existence of and information supplied by the confidential informant. Indeed, the internal detail of the purported statement and its consistency with other facts already known to the officers tends to support rather than detract from the credibility of the officer's report concerning the confidential informant. We find nothing in the record to remotely suggest that the general rule of nondisclosure of confidential informants should have been disregarded in this case.

AFFIRMED.

Entered for the Court

Monroe G. McKay
Circuit Judge

APPENDIX C

UNITED STATES COURT OF APPEALS
FOR THE TENTH CIRCUIT

UNITED STATES OF AMERICA, Plaintiff - Appellee, v. ROBERT DOUGLAS COOK, Defendant - Appellant.	No. 88-2930

ORDER

Filed February 2, 1990

Before HOLLOWAY, Chief Judge, GARTH*, and McKAY, Circuit Judges.

The captioned appeal comes on for consideration of appellant's petition for rehearing.

Upon consideration whereof, appellant's petition for rehearing is denied.

Entered for the Court

/s/ Robert L. Hoecker
ROBERT L. HOECKER, Clerk

* Honorable Leonard I. Garth, United States Circuit Judge for the Third Circuit, sitting by designation.